

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	CASE NO. 8:10CR393
	)	
Plaintiff,	)	
	)	
vs.	)	TENTATIVE FINDINGS
	)	
GARY E. McGAA,	)	
	)	
Defendant.	)	

The Court has received the Presentence Investigation Report ("PSR") and the Defendant's objections thereto (Filing No. 31). The government adopted the PSR (Filing No. 33). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are advisory.

The Defendant objects to several paragraphs of the PSR, but the objections are primarily made with respect to the enhancements set out in ¶¶ 30 and 33. The objections are discussed below.

**¶ 30 - U.S.S.G. § 2G2.2(b)(3)(B) - Distribution**

The plea agreement contemplated a 2-level enhancement under U.S.S.G. § 2.2(b)(3)(F), and the Defendant argues the 5-level enhancement under § 2G2.2(b)(3)(B) is outside the plea agreement. The objection will be heard at sentencing.

**¶ 33 - U.S.S.G. § 2G2.2(b)(7)(D) - Number of Images**

The Defendant argues the number of images stated in the PSR and the 5-level enhancement is excessive. However, the plea agreement contemplated a 4- or 5-level enhancement for the number of images. The objection is denied.

**Request for Downward Departure or Variance**

A separate motion was not filed as contemplated by the sentencing schedule. However, this request is included in the brief in support of objections to the PSR. If the Defendant raises this matter at sentencing, it will be addressed.

IT IS ORDERED:

1. The Defendant's objections to ¶ 33 is denied;
2. The Defendant's objections to ¶ 30 will be heard at sentencing;
3. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;
4. Absent submission of the information required by paragraph 3 of this Order, my tentative findings may become final; and
5. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing.

DATED this 21<sup>st</sup> day of March, 2011.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge